SUPREME COURT, U.S.
FILED
JUL 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 76-1261

THE CHASE MANHATTAN BANK, a New York national banking association,

Defendant-Petitioner

—against—

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

Plaintiffs-Respondents

AND

RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RUSSELL E. BROOKS
1 Chase Manhattan Plaza
New York, New York 10005
Attorney for petitioner
The Chase Manhattan Bank,
National Association

Of Counsel

MILBANK, TWEED, HADLEY
& MCCLOY

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Section 94 of the National Bank Act, 12 U.S.C. § 94 _ *passim*

IN THE

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No.

THE CHASE MANHATTAN BANK, a New York national banking association,

Defendant-Petitioner

—against—

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

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Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner The Chase Manhattan Bank, National Association ("Chase") seeks a writ of certiorari to review an order of the District Court of Appeal, Third District, of

the State of Florida* which, without opinion, contravenes Section 94 of the National Bank Act, 12 U.S.C. § 94, and compels Chase, a national bank established and located in New York, to defend this *in personam* action in Florida.

Decisions Below

The order of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, denying Chase's motion under Section 94 of the National Bank Act to quash service and dismiss the complaint is printed as Appendix A, p. A1, *infra.*

The order of the District Court of Appeal of Florida, Third District, affirming the denial of Chase's motion to dismiss is printed as Appendix B, p. A2, *infra.* The order of the District Court of Appeal denying Chase's petition for rehearing is printed as Appendix C, p. A3, *infra.*

The order of the Supreme Court of Florida denying for lack of jurisdiction Chase's petition for certiorari is printed as Appendix D, p. A4, *infra.*

Not one of the foregoing orders was accompanied by an opinion.

Jurisdiction

The order of the Supreme Court of Florida denying Chase's petition for a writ of certiorari was filed on April 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).**

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* This petition is directed to the District Court of Appeal because, while the Florida Supreme Court denied Chase's petition for certiorari, it did so on the ground of lack of jurisdiction and therefore entered no judgment. *See* Callender v. Florida, 380 U.S. 519 (1965), 383 U.S. 270 (1966).

** 28 U.S.C. § 1257(2) provides that a final judgment or decree of the highest court of a state may be reviewed by this Court where the validity of a federal statute is thereby drawn into question. A federal statute has clearly been drawn into question by the decision below and the only other jurisdictional issue, *i.e.*, whether that decision is "final," has been resolved by this Court in its opinion in Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963), where the Court

(*continued on page 3*)

Questions Presented

1. Did the court below err in sustaining venue of the action in Florida as against a national bank established and located in New York in view of the prohibition of Section 94 of the National Bank Act, 12 U.S.C. § 94, permitting a national bank to be sued only where it is established or located, and where there was no basis for finding either an exemption from or waiver of the venue provision?

2. Do the orders of the Florida courts denying effect to an important federal statute, without any opinion or explanation, so far depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

Statute Involved

The statute involved is Section 94 of the National Bank Act, 12 U.S.C. § 94, which provides:

"§ 94. Venue of Suits.

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Statement of the Case

This action was commenced in the Circuit Court for Dade County, Florida, on November 13, 1974. The com-

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(*continued from page 2*)

ruled in favor of accepting jurisdiction over the very question at issue here—the applicability of 12 U.S.C. § 94—prior to any consideration by the court below of the merits. The federal issue, *i.e.*, the applicability of 12 U.S.C. § 94, has been finally decided at the highest state level and Chase's position, if correct, should prohibit consideration of the merits as regards Chase in the Florida forum.

plaint alleges in substance that the Trustees of the Chase Manhattan Mortgage and Realty Trust and Chase, investment advisor to the Trust, breached the terms of a commitment by the Trust to fund a housing development proposed by plaintiffs. Chase was not a party to that commitment, nor did it execute any of the loan documents in connection with that commitment.

Chase is a national banking association. Chase's charter specifies that it is located in New York, New York. Chase moved to quash service of process and to dismiss the complaint on January 6, 1975, on the ground that venue in Dade County, Florida, was improper as to Chase by reason of the venue provisions of Section 94 of the National Bank Act, 12 U.S.C. § 94.

The Circuit Court for Dade County denied Chase's motion without opinion on March 13, 1975. Chase appealed to the Florida District Court of Appeal on the ground that the decision of the Circuit Court contravened Section 94 of the National Bank Act, which provides that a national bank can be sued only in the jurisdiction in which it is established or located.

The District Court of Appeal affirmed the decision of the Circuit Court without opinion on July 29, 1975. Chase moved for rehearing on the ground that the District Court of Appeal had overlooked or failed to consider the venue provisions of Section 94. The petition was denied without opinion on September 11, 1975.

On October 14, 1975, Chase filed a petition for a writ of certiorari in the Supreme Court of Florida on the ground that the failure of the lower court to apply Section 94 was in direct conflict with prior decisions of the Florida appellate courts. Certiorari was denied on April 30, 1976.

Meanwhile, discovery in the action is proceeding. No trial date has been set.

REASONS FOR GRANTING THE WRIT

This Court should now review and reverse the decision of the District Court of Appeal of Florida because it contravenes a controlling federal statute without explanation or justification and in flagrant disregard of the prior decisions of this Court, as well as those of other federal and state courts, including the courts of the State of Florida.

The Court Below Failed to Apply or Misapplied a Controlling Federal Statute With no Attempt to Justify its Order

The decision below failed to apply or misapplied the venue provisions legislated by Congress in Section 94 of the National Bank Act. Section 94 provides, in essence, that litigation against a national bank may proceed only in a state or federal court in the district, county or city in which the bank is established or located, *i.e.*, maintains its principal place of business. This provision is mandatory, not discretionary in application and, since Chase admittedly maintains its principal place of business in New York, New York, Section 94, if correctly applied by the Florida courts, would preclude this suit against Chase in Florida.

The absence of any written opinion by any Florida courts renders it impossible to determine whether the Florida Courts misconstrued Section 94 or simply failed to consider it. However, in either event, the decision below is in direct conflict with the statute and well-recognized decisions of this Court.

(1) Contrary to the mandate of this Court, the District Court of Appeal of Florida failed to apply the venue provision of Section 94.

The failure of the court below to apply Section 94 contravenes the repeated holdings of this Court that the venue provision of the National Bank Act is mandatory. In

Mercantile National Bank at Dallas v. *Langdeau,* 371 U.S. 555, 562 (1963), this Court concluded that the specific venue provision of Section 94 takes precedence over general state venue provisions and "...must be given a mandatory reading." Congress had specified the precise federal and state courts in which suits against national banks could proceed and this Court "... would not lightly conclude that a congressional enactment has no purpose or function." *Mercantile National Bank at Dallas* v. *Langdeau, supra,* at 560. See also, *Cope* v. *Anderson,* 331 U.S. 461, 467 (1947) ("For jurisdictional purposes, a national bank is a 'citizen' of the state in which it is established or located (citations omitted), and in that district *alone* can it be sued." (Emphasis added.))

This Court has only recently upheld the mandatory nature of the venue provision of Section 94 as against the general venue provision of another federal statute. In *Radzanower* v. *Touche Ross & Co.*, 44 U.S.L.W. 4762, 4765 (June 7, 1976), this Court held that "...the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act. We conclude, therefore, that a national banking association is subject to suit under the Securities Exchange Act only in that district where it is established ...." It is settled law that a national bank is established at the place specified in the bank's charter. *Radzanower* v. *Touche Ross & Co., supra,* at 4762-63. Chase's charter specifies New York, New York.

The lower federal courts have been unanimous in construing Section 94 as requiring that national banks be sued only in the district in which they are established. See *Leonardi* v. *Chase National Bank,* 81 F.2d 19, 22 (2d Cir.), *cert. denied,* 298 U.S. 677 (1936); *Buffum* v. *Chase National Bank,* 192 F.2d 58, 60 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 394 F.2d 300, 304 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968); *United States National Bank* v. *Hill,*

434 F.2d 1019, 1020 (9th Cir. 1970); *First National Bank of Boston* v. *United States District Court for the Central District of California,* 468 F.2d 180, 182-83 (9th Cir. 1972); *Helco, Inc.* v. *First National City Bank,* 470 F.2d 883, 885 (3d Cir. 1972); *International Refugee Organization* v. *Bank of America National Trust & Savings Association,* 86 F.Supp. 884, 886 (S.D.N.Y. 1949); *General Electric Credit Corp.* v. *James Talcott, Inc.,* 271 F.Supp. 699, 708 (S.D.N.Y. 1966).

Moreover, the Florida District Court of Appeal itself recognized, in its opinion in *Exchange National Bank of Chicago* v. *Rock,* 197 So.2d 52 (Fla. Dist. Ct. App. 1967), that the Section 94 venue provision is mandatory. In reversing the lower court's failure to apply Section 94 in that case, the Florida District Court of Appeal cited the decision of this Court in *Mercantile National Bank at Dallas* v. *Langdeau, supra,* and held that, "[t]he federal statute prescribing venue in the district or county in which the bank is located is mandatory...." 197 So.2d at 53.

There is no doubt that Section 94 bars suit against Chase in any place other than in New York. The failure of the court below to apply Section 94 contravenes the words and purpose of the statute and the decisions of this Court, other federal courts, and the courts of the State of Florida. The importance of proper and consistent application of a controlling federal statute requires that certiorari be granted and the decision below reversed.

(2) The District Court of Appeal of Florida misapplied the Section 94 venue provision.

If the court below did consider Section 94, its decision affirming venue in Florida as against Chase could only have been based upon one of the two recognized exceptions to Section 94: that the instant action was a "local" action or that Chase had waived its Section 94 venue right. Since not one of the three Florida Courts articulated the reasoning underlying its decision, it is impossible to determine which, if either, of these two theories might have been thought to

justify venue in Florida. However, it is clear that there was no basis for applying either theory.

If applied, the court below could only have misconceived the nature of the local action exception to Section 94 defined by this Court in *Casey* v. *Adams,* 102 U.S. 66 (1880). Although plaintiffs argued that any action involving real property located in the State of Florida necessarily qualifies as a "local action" for purposes of the exception to Section 94, that argument is clearly incorrect.

This Court has defined the "local action" exception to cover those cases in which a plaintiff would otherwise be effectively prevented by the venue provisions of Section 94 from obtaining the relief sought, *i.e.,* the action could *only* be brought at the situs of the property involved in the litigation. *Casey* v. *Adams, supra,* at 68; *Michigan National Bank* v. *Robertson,* 372 U.S. 591, 593 (1963).

It is clear that this action is not "local" as defined in *Casey.* Rather, this action is a routine *in personam* action for alleged breach of an agreement (to which Chase is not even a party). The fact that the subject of that agreement involved proposed construction on real property located in Dade County, Florida does not convert the action into an *in rem* proceeding, particularly as to Chase, which merely acted as investment advisor to the lender. The action could have been brought in the state or federal courts of New York where the same relief sought in Florida—damages and specific performance—is available.

Nor would the Court below be correct in concurring with plaintiffs' contention that Chase "relocated" itself in Florida for the purpose of transacting business with plaintiffs and thereby waived its Section 94 venue right. The sole basis for such a finding is the unsupported, unverified allegations of plaintiffs' complaint, which hardly constitute requisite proof of conduct of Chase amounting to "a voluntary and intentional relinquishment or abandonment"

of the privilege. *Buffum* v. *Chase National Bank, supra,* 192 F.2d at 60-61. The record is otherwise devoid of any indication that Chase entered the State of Florida with the purpose of transacting business with plaintiffs.

However, even if the allegations of the complaint were true—which they are not—it would be apparent that the only contacts Chase had with the State of Florida during the 12 month period here in question were two brief visits to plaintiffs' office by a junior appraisal officer. This is hardly sufficient to constitute a "relocation" of Chase in Florida or a waiver of Chase's Section 94 venue right.

Indeed, even if Chase had been party to the loan commitment—which it was not—and had transacted business with plaintiffs in Florida—which it did not—and even if it had done so not via two brief visits by a junior officer but through a branch bank or wholly-owned subsidiary located in Florida, it is clear that even this conduct would not constitute a waiver of the venue provisions of Section 94. See *Helco* v. *First National City Bank, supra,* 470 F.2d at 885. ("It is axiomatic that a waiver is a voluntary and intentional relinquishment or abandonment of a known right.... We do not think that the requisite intent to waive this venue right can be implied merely from the act of doing business outside the district in which the bank is established.")

If the court below implied waiver on the basis of the record before it, it clearly misapplied Section 94 and the decisions of this Court. In each of the decisions referred to in this petition—including the decisions of this Court in *Mercantile National Bank* v. *Langdeau, supra,* and *Michigan National Bank* v. *Robertson, supra*—the national bank involved was being sued in a district in which it was doing business. However, the important fact is that it was not the district in which the bank was established and, as a consequence, the proper application of Section 94 mandated

that the action be dismissed as against the bank for improper venue.

The court below had no basis on the law or the facts for finding either an exemption from or waiver of Chase's Section 94 venue right and to the extent it did so, it misapplied the controlling federal statute in a manner inconsistent with the decisions of this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision below reversed.

July 28, 1976

Respectfully submitted,

RUSSELL E. BROOKS
1 Chase Manhattan Plaza
New York, New York 10005
Attorney for petitioner
The Chase Manhattan Bank,
National Association

Of Counsel

MILBANK, TWEED, HADLEY
& MCCLOY

APPENDIX A

ORDER DENYING MOTION TO QUASH AND DISMISS

THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA

SAILBOAT APARTMENT CORP., a Florida corporation, et al.,

Plaintiffs,

vs.

CHASE MANHATTAN BANK, a New York national banking association, et al.,

Defendants.

THIS CAUSE having come on for hearing on Defendant Chase Manhattan Bank, N.A.'s Motion to Quash Service and Dismiss Complaint, the Court having heard argument of counsel, having reviewed the pleadings, documents and other memoranda in the file, and being otherwise fully advised in the premises, it is, upon consideration,

ORDERED AND ADJUDGED as follows:

1. Chase Manhattan Bank, N.A.'s Motion to Quash and Dismiss is denied.

2. Chase Manhattan Bank, N.A. shall file an Answer within twenty (20) days from the date of this Order.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 13th day of March, 1976.

LEWIS B. WHITWORTH
Circuit Court Judge

APPENDIX B

ORDER OF THE DISTRICT COURT OF APPEAL

THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CHASE MANHATTAN BANK, a New York national banking association,

Appellant,

vs.

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, HESTER KAPELOW, individually, jointly and severally, RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSELY, JAMES D. LANDAUER, FREDERIC P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Appellees.

Opinion filed July 29, 1975.

An interlocutory Appeal from the Circuit Court for Dade County, Lewis B. Whitworth, Judge.

Jones, Paine & Foster and Marjorie D. Gadarian, for Appellant.

Pettigrew & Bailey; Greenberg, Traurig, Hoffman, Lipoff & Quentel; Smathers & Thompson, for appellees.

Before BARKDULL, C. J., and HENDRY and NATHAN, JJ.

PER CURIAM.

Affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CHASE MANHATTAN BANK, a New York national banking association,

Appellant,

vs.

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, HESTER KAPELOW, individually, jointly and severally, RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERIC P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Appellees.

Thursday, September 11, 1975

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

CLERK, *District Court of Appeal, Third District*

APPPENDIX D

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF FLORIDA

CHASE MANHATTAN BANK, ETC.,

Petitioner,

vs.

SAILBOAT APARTMENT CORP., ETC., et al.,

Respondents.

FRIDAY, April 30, 1976

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., ROBERTS, ADKINS, BOYD AND HATCHETT, JJ., CONCUR